Malaysia British Assurance Bhd v Sihazko Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D7–22–55 OF 2000
SELVENTHIRANATHAN J
15 DECEMBER 2004

Contract Law — Consideration — Past consideration — Reciprocal promise — Letter of indemnity issued earlier than insurance guarantee — Whether valid consideration — Contracts Act1950 s 2

The first defendant accepted a tender issued by PNS Development Sdn Bhd ('PNS') for the construction of 175 units of terraced houses. One of the terms which the first defendant had to comply with before the commencement of the construction works was the execution of a performance bond in favour of PNS in the form of a bank or insurance guarantee for the sum equivalent to 5% of the contract sum. At the defendants' request, the plaintiff issued an insurance guarantee dated 5 September 1994 ('the insurance guarantee') in favour of PNS. In consideration thereof, the defendants executed letters of indemnity dated 3 September 1994 ('letters of indemnity') in favour of the plaintiff whereby they undertook to indemnify the plaintiff in respect of all payments made by the plaintiff pursuant to the insurance guarantee. PNS called upon the performance bond and the plaintiff issued payment to PNS. The plaintiff then demanded indemnification from the defendants for the sum paid out. The issues raised by the defendants were, inter alia: (i) the letters of indemnity were void and unenforceable for lack of consideration as the insurance guarantee was dated later then the letters of indemnity, ie on 5 September 1994. Thus, it was argued that when the letters of indemnity were executed on the 3 September 1994, no consideration therefor had been given by the plaintiff; (ii) the plaintiff's claim was an action for the recovery of a penalty or forfeiture and the limitation period in respect of such claim was one year by virtue of s 6(4) of the Limitation Act 1953

Held, dismissing the appeal with costs:

(1) It was clear that the defendants executed the letters of indemnity on the basis of the undertaking given by the plaintiff to issue the insurance guarantee, which was in fact issued on 5 September 1994. Therefore, itwas unmistakeable that this undertaking or promise by the plaintiff must be construed as good consideration in view of the interpretation given to the expression 'consideration' in s 2(d) of the Contracts Act 1950. In fact, the exchange of mutual promises in the instant case, ie the execution of the letters of indemnity and the issuance of the insurance guarantee, formed the consideration for each other as reciprocal promises within the meaning of paras (e) and (f) of s 2 of the Contracts Act 1950 (see para 11,12 and 13).

(2) The plaintiff's claim was based purely on the letters of indemnity executed by the defendants in respect of the sum paid out to PNS by the plaintiff under the insurance guarantee. There was therefore no element involving any recovery of any penalty or forfeiture or sum by way of penalty or forfeiture in the circumstances. It was simply the recovery of a debt due and owing by the defendants to the plaintiff as a result of the payment made to PNS by the plaintiff (see para 20).

[**Bahasa Malaysia summary**

Defendan pertama menerima satu tender yang dikeluarkan oleh PNS Development Sdn Bhd ('PNS') untuk pembinaan 175 unit rumah teres. Salah satu dari termanya yang perlu dipatuhi oleh defendan pertama sebelum memulakan kerja-kerja pembinaan ialah menyempurnakan satu bon pelaksanaan yang berpihak kepada PNS dalam bentuk bank atau insurans gerenti untuk jumlah bersamaan dengan 5% nilai kontrak. Pada permintaan defendan-defendan, plaintif mengeluarkan satu insuran gerenti bertarikh 5 September 1994 ('insurans gerenti') yang berpihakkan PNS. Sebagai balasan, defendan-defendan menyempurnakan surat-surat tanggung rugi bertarikh 3 September 1994 (surat-surat tanggung rugi) yang berpihakkan plaintif di mana mereka berakujanji untuk menanggung rugi kesemua bayaran yang dibuat oleh plaintif berikutan dari insurans gerenti. PNS melaksanakan bon pelaksanaan terhadap defendan pertama dan plaintif membuat bayaran kepada PNS. Plaintif kemudiannya menuntut tanggungrugi daripada defendan-defendan untuk jumlah yang telah dibayarnya itu. Isu-isu yang dibangkitkan oleh defendan-defendan antara lain adalah; (i) surat-surat tanggung rugi tersebut tidak sah dan tidak boleh diikuatkuasakan atas sebab tiada balasan kerana insurans gerenti itu dikeluarkan selepas dari tarikh surat-surat tanggung rugi iaitu 5 September 1994. Oleh yang demikian, ianya dihujahkan bahawa apabila surat-surat tanggung rugi tersebut yang disempurnakan pada 3 September 1994, tiada balasan diberikan oleh plaintif; (ii) tuntutan plaintif adalah satu tindakan untuk mendapat kembali satu penalti atau perlucuthakan dan tempoh had masa berhubung dengan tuntutan sedemikian adalah satu tahun di bawah s 6(4) Akta Had Masa 1953

Diputuskan, menolak rayuan dengan kos:

(1) Ia jelas bahawa defendan-defendan menyempurnakan surat-surat tanggung rugi pada dasar akujanji yang diberikan oleh plaintif yang ia akan mengeluarkan insurans gerenti, yang mana ianya telah dikeluarkan pada 5 September 1994. Oleh yang demikian, tidak silap lagi bahawa akujanji ini atau janji yang dibuat oleh plaintif ini mestilah ditafsirkan sebagai balasan yang mencukupi memandangkan tafsiran yang diberikan kepada ungkapan 'balasan' dalam s 2(d) Akta Kontrak 1950. Malahan, pertukaran janji-janji dalam kes semasa ini, iaitu pelaksanaan surat-surat tanggung rugi dan pengeluaran insurans gerenti menjadi balasan untuk janji

bersilang dalam maksud perenggan (e) dan (f) Akta Kontrak 1950 (lihat perenggan 11, 12 dan 13)

(2) Tuntutan plaintif berdasarkan semata-mata pada surat-surat tanggung rugi yang disempurnakan oleh defendan-defendan berhubung dengan jumlah yang dibayar kepada PNS oleh plaintif di bawah insurans gerenti. Oleh itu tiada elemen yang melibatkan sebarang mendapat kembali apa-apa penalti atau perlucuthakkan dalam keadaan ini. Ianya hanyalah satu perbuatan mendapat kembali hutang yang kena dibayar dan terhutang oleh defendan-defendan kepada plaintif akibat dari pembayaran yang telah dibuat oleh plaintif kepada PNS (lihat perenggan 20).]

Notes

For cases on past consideration, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2689–2695.

Cases referred to

First National Bank of Chicago, The v Lam Thoo Sang & Ors [1980] 1 MLJ 260 (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283 (refd)

Legislation referred to

Contracts Act 1950
Limitation Act 1953 s 6(4)
Rules of the High Court 1980 O 14 s 2, (d)

Tan Keng Teck (Lim Kian Leong & Co) for the plaintiff/respondent.
Nordin Kassim (Nordin Adenan & Co) for the first and second defendants/appellants.
Harcharan Singh (Harcharan S Singh & Associates) for the fourth and sixth defendants/appellants.

Selventhiranathan J:

[1] Two notices of appeal were filed herein in respect of the decision of the learned senior assistant registrar ('the registrar') allowing the plaintiff to sign final judgment on an application under O 14 of the Rules of the High Court 1980 ('Order 14 application') against the first, second, fourth and sixth defendants. The first notice of appeal in encl 31 was filed by the fourth and sixth defendants while the second notice of appeal in encl 32 was filed by the first and second defendants.

[2] The registrar had, on a separate O 14 application taken out by the plaintiff, similarly allowed the plaintiff to sign final judgment against the fifth defendant. However, the fifth defendant did not appeal against the said decision.

[3] As for the third defendant, judgment in default of appearance had also been entered against him and there is no evidence in the file to indicate that any action has been taken by him to apply to set the judgment aside.

[4] The plaintiffs claim against all the defendants was preceded by a letter of agreement on the part of the first defendant to accept a tender issued by a company called PNS Development Sdn Bhd ('PNS') for the first defendant to construct a total of one hundred and seventy-five units of terraced houses in Province Wellesley, Penang for PNS. The agreement was subject to the compliance by the first defendant of the various terms and conditions stipulated therein. One of the terms which the first defendant had to comply with before the commencement of the construction works was the execution of a performance bond in favour of PNS in the form of a bank or insurance guarantee for the sum of RM442,977.55, which constituted 5% of the contracted sum of RM8,859,551.00 for the construction works in question.

[5] At the request of the defendants and one Ching Ngew Hoe ('Ching'), the plaintiff issued an insurance guarantee bearing number 12335/IG/94 dated the 5 September 1994 ('the insurance guarantee') in favour of PNS for the sum of RM442,977.55. In consideration of the plaintiff issuing the insurance guarantee, the defendants and Ching executed letters of indemnity dated the 3 September 1994 in favour of the plaintiff whereby they undertook to indemnify the plaintiff in respect of all payments made by the plaintiff pursuant to the performance bond constituted by the insurance guarantee.

[6] On the 12 September 1997, PNS called upon the performance bond by making a demand upon the plaintiff to pay over the sum of RM442,977.55 on the ground that the first defendant had failed and refused to fulfil its obligations under the contract entered into between the first defendant and PNS. As a result, the plaintiff through a covering letter dated the 9 October 1998 extended to PNS a cheque for the sum of RM442,977.55 as payment. Consequently, the plaintiff demanded indemnification from the defendants and Ching for the said sum pursuant to the letters of indemnity.

[7] It is pertinent to note that under the insurance guarantee the defendants were required to and did deposit a cash collateral in the sum of RM44,297.76 with the plaintiff. The plaintiff agreed to pay interest at the rate of 2% per annum on this collateral with effect from the 7 November 1994.

[8] In the circumstances, according to the plaintiff, the actual amount which was therefore due and owing by the defendants, after deducting the cash collateral deposited with the plaintiff and interest accrued thereon, stood at RM395,203.93. In respect of this amount, Ching had paid a sum of RM100 to the plaintiff to discharge his liability under the letter of indemnity which he had executed. The plaintiff had agreed to this, leaving the balance of RM295,203.93 to be settled by the defendants.

[9] Since the applicable facts of this case were the same in respect of the first, second, fourth and sixth defendants, the issues raised by them were determined without specific reference to the individual arguments on their behalf.

[10] The primary issue raised by the defendants concerned the letters of indemnity dated the 3 September 1994. The defendants contended that the said letters of indemnity executed by them were void and unenforceable for lack of consideration as the insurance guarantee was dated the 5 September 1994. As such, it was urged upon the court that when the letters of indemnity were executed on the 3 September 1994, no consideration therefor had been given by the plaintiff.

[11] However, it was abundantly clear that the defendants executed the letters of indemnity on the basis of the undertaking given by the plaintiff to issue the insurance guarantee, and which guarantee was in fact issued on the 5 September 1994. Therefore it was unmistakeable that this undertaking or promise by the plaintiff must be construed as good consideration in view of the interpretation given to the expression 'consideration' in s 2(d) of the Contracts Act 1950 which reads as follows:

> (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;.

[12] In the present case, the plaintiff as promisor required the defendants as promisees to execute the letters of indemnity as consideration for the issuance of the insurance guarantee. Upon the execution of the letters of indemnity, the insurance guarantee was issued. The circumstances obtaining in this case were therefore so clear-cut that the submissions of both the learned counsel for the defendants on this issue were totally devoid of merit. The Court of Appeal, speaking through Gopal Sri Ram JCA, laid down its view succinctly on this point in the case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 290 as follows:

> It is not and has never been the law of this country that to support an agreement, consideration must always be executed. Executory consideration suffices.

[13] In fact, and additionally, the exchange of mutual promises in this case, ie the execution of the letters of indemnity and the issuance of the insurance guarantee, formed the consideration for each other as reciprocal promises within the meaning of paras (e) and (f) of s 2 of the Contracts Act 1950 which provide as follows:

> (e) every promise and every set of promises, forming the consideration for each other, is an agreement;
>
> (f) promises which form the consideration or part of the consideration for each other are called reciprocal promises;

[14] Therefore it was crystal clear that consideration was in fact provided by the plaintiff for the letters of indemnity executed by the defendants despite their execution preceding the issuance of the insurance guarantee in point of time.

[15] In view of the finding of this court on the issue of consideration, the next issue of nudum pactum clearly could not be maintained at all. There is a decision of the High Court in Singapore, namely; *The First National Bank of Chicago v Lam Thoo Sang & Ors* [1980] 1 MLJ 260, where the first defendant there also pleaded nudum pactum and his position was explained in the following words by Rajah J:

> The first defendant although admitting the signing of the guarantee pleaded that the guarantee did not express therein the consideration for his promise and that 'for want of consideration appearing on the face of the said guarantee, it stood simply as an engagement to pay the debt of another without any consideration,' and was therefore, 'a nudum pactum and void'.

[16] However, in deciding this issue, the learned judge said at p 261 of the report of that case:

> My view of the matter is that the guarantee and the debenture must be read together and when this is done it is patently clear that what the guarantors did guarantee under the guarantee was money which was due and owing as of 2 May 1974 and money to be lent thereafter to the total extent of $1,500,000. Consideration for the said guarantee in my view was the plaintiff bank being induced to sign the debenture.

[17] By analogy, the consideration for the letters of indemnity executed by the defendants for that matter in the present case was the plaintiff being induced to issue the insurance guarantee in favour of PNS.

[18] As for the allegation pertaining to the notices of demand, there obviously was no error in the figures as shown therein as the defendants, pursuant to each cl 11 of the letters of indemnity, were liable to the plaintiff as principal debtors. Hence, there was no basis for the defendants to suggest that there was duplication in the amount as stated in the notices of demand. Even if one of them settled the sum demanded, all of them would have been discharged from liability to pay any further sum.

[19] Finally, the defendants alleged that the claim of the plaintiff against them was an action for the recovery of a penalty or forfeiture and the limitation period in respect of such a claim was one year by virtue of s 6(4) of the Limitation Act 1953 which provides as follows:

> (4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:

Provided that for the purpose of this subsection the expression 'penalty' shall not include a fine to which a person is liable on conviction for a criminal offence.

[20] Looking at the plaintiffs claim, there was absolutely no basis for the defendants to suggest that it was one which involved the recovery of a penalty or forfeiture or sum by way of penalty or forfeiture, as the case may be. The plaintiff's claim was based purely on the letters of indemnity executed by the defendants in respect of the sum of RM442,977.55 paid to PNS by the plaintiff under the insurance guarantee. There was therefore no element involving any recovery of any penalty or forfeiture or sum by way of penalty or forfeiture in the circumstances. It was simply the recovery of a debt due and owing by the defendants (minus credit given for the cash collateral and interest earned thereon) as a result of the plaintiff paying out the sum of RM442,977.55 to PNS.

[21] For the foregoing reasons the two notices of appeal taken out by the defendants vide encls 31 and 32 were clearly misconceived and they were therefore dismissed with costs to the plaintiff, with the same to be taxed unless otherwise agreed upon.

Appeal dismissed with costs.

Reported by Izzaty Izzuddin